IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " A "

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T.A. No.1728/Bang/2013 (Assessment Year : 2009-10)		
Dy. Commissioner of Income Tax, Circle 12(4), Bangalore.	Vs.	M/s. Teleradiology Solutions Pvt. Ltd. 7G1, Visheshwaraiah Indl. Area, ITPL Road, Opp. Graphite India, Bangalore-560 048 PAN AABCT 8183H
Appellant		Respondent.

Appellant By : Shri C.H.Sundar Rao, CIT (D.R)
Respondent By : Shri Navneet N Kini, C.A.

Date of Hearing : 29.12.2014.
Date of Pronouncement : 13.2.2015.

O R D E R

Per Shri Jason P. Boaz, A.M. :

This appeal by Revenue is preferred against the order of the Commissioner of Income Tax (Appeals)-III, Bangalore dt.20.9.2013 for Assessment Year 2009-10.

2. The facts of the case, briefly, are as under :-

2.1 The assessee, a company engaged in the business of information technology enabled services ('ITES'), filed its return of income for Assessment Year 2009-10 on 24.9.2009 declaring income of Rs.1,10,87,680 after claiming deduction of Rs.15,20,33,464 under Section 10A of the Income Tax Act, 1961 (herein after referred to as 'the Act'). The

case was taken up for scrutiny and the assessment was completed under Section 143(3) of the Act vide order dt.30.11.2011 wherein the income of the assessee was determined at Rs.16,51,58,755 as against the returned income of Rs.1,10,87,680 in view of various additions / disallowances.

2.2 Aggrieved by the order of assessment for Assessment Year 2009-10 dt.30.11.2011, the assessee preferred an appeal before the CIT (Appeals) – III, Bangalore. The learned CIT(A) disposed off the assessee's appeal by order dt.20.9.2013 allowing the assessee's appeal.

3. Revenue, being aggrieved by the order of the CIT (Appeals) – III, Bangalore dt.20.9.2013 for Assessment Year 2009-10, has preferred this appeal raising the following grounds :-

"1. The order of the learned CIT (Appeals) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case the learned CIT (Appeals) erred in law in directing the Assessing Officer to exclude the reimbursement of expenditure incurred in foreign currency towards foreign travel and insurance expenses both from the export turnover as well as from total turnover for the purpose of computation of deduction under Section 10A, without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by sub-clause (4) of Explanation 2 below sub-section (8) of section 10A and the total turnover has not been defined in this section.
3. On the facts and in the circumstances of the case the learned CIT (Appeals) erred in holding that the broadband services are not in the nature of technical services and TDS need not be made under Section 194J of the IT Act are applicable. Further, the decisions relied upon by the CIT (Appeals) are not pronounced by the jurisdictional courts and the matter is yet to reach finality.
4. On the facts and in the circumstances of the case the learned CIT (Appeals) erred in holding that the repairs charges ofRs.17,43,738 is allowable expenditure

without appreciating the fact that the expenditure has been incurred towards granite work, pavement work, gate and septic tank and the same has been rightly taken as capital expenditure by the A.O.

5. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT (Appeals) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

6. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.

4. The Grounds raised at S.Nos.1, 5 & 6, are general in nature and therefore, no adjudication is called for thereon.

5. **Ground No.2 – Deduction u/s.10A of the Act**.

5.1 In this Ground, Revenue assails the order of the learned CIT(A) in directing the Assessing Officer to exclude the reimbursement of expenditure incurred in foreign exchange towards foreign travel and insurance expenses both from the export turnover as well as total turnover while computing the deduction under Section 10A of the Act. The learned Departmental Representative was heard on the grounds raised and supported the order of the Assessing Officer.

5.2 The learned Authorised Representative submitted that there was no error in the impugned order of the learned CIT(A) in directing that expenses excluded from the export turnover should also be excluded from the total turnover, for the purpose of computation of the deduction under Section 10A of the Act since she followed the binding decision of the Hon'ble High Court of Karnataka in the case of CIT V Tata Elxsi Ltd. (349

ITR 98). The learned Authorised Representative submitted that in view of this, revenue's appeal is liable to be dismissed.

5.3.1 The facts of the matter are that, in the course of assessment proceedings, the Assessing Officer observed that the assessee had claimed an amount of Rs.15,20,33,464 as deduction under Section 10A of the Act. On examination of the assessee's claim, the Assessing Officer excluded the following expenditure incurred in foreign currency i.e. Rs.1,45,39,312 on telecommunications; Rs.63,026 on insurance and Rs.66,75,816 on technical services outside India from export turnover and recomputed the deduction under Section 10A of the Act at Rs.10,43,32,376. On appeal, the learned CIT(A), following the decision of the Hon'ble High Court of Karnataka in the case of Tata Elxsi Ltd. (supra) directed the Assessing Officer to exclude the above expenditure amounting to Rs.2,12,78,154 from both export turnover as well as total turnover and recompute the deduction under Section 10A of the Act accordingly.

5.3.2 We have heard both sides and perused and carefully considered the material on record and the judicial decision cited. On perusal thereof we find that the issue before us for adjudication i.e. if expenditure incurred in foreign currency on foreign travelling, insurance and provision of technical services abroad is reduced from export turnover an equal amount should also be reduced from total turnover while computing the deduction under section 10A of the Act, is covered in favour of the assessee by the decision of the

Hon'ble Karnataka High Court in the case of Tata Elxsi Ltd. (supra). In this order, the Hon'ble Court held –

> *" The Bombay High Court had an occasion to consider the earning of the word 'total turnover' in the context of section 10A, in the case of CIT Vs. Gem Plus Jewellery India Ltd. (2011) [330 ITR P. 175 (Bom)] (2010-TIOL-456-HC-MUM-IT). Interpreting sub-section (4) of section 10A, it is held as under :*
>
> *"Under sub-section (4) the proportion between the export turnover in respect of the articles or things, or as the case may be, computer software exported, to the total turnover of the business carried over by the undertaking is applied to the profits of the business of the undertaking in computing the profits of the business of the undertaking in computing the profits derived from export. In other words the profits of the business of the undertaking are multiplied by the export turnover in respect of the articles, things or, as the case may be, computer software and divided by the total turnover of the business carried on by the undertaking. The formula which is prescribed by sub-section (4) of section 10A is as follows :*

<table>
<tr><td rowspan="2">Profits derived from export of articles or things or computer software.</td><td>Profits of the business of the undertaking.</td><td>Export turnover in respect of the articles or things or computer software.</td></tr>
<tr><td colspan="2">Total turnover of the business carried on by the undertaking</td></tr>
</table>

> *The total turnover of the business carried on by the undertaking would consist of the turnover from export and the turnover from local sales. The export turnover constitutes the numerator in the formula prescribed by sub-section (4). Export turnover also forms a constituent element of the denominator in as much as the export turnover is a part of the total turnover. The export*

turnover, in the numerator must have the same meaning as the export turnover which is constituent element of the total turnover in the denominator. The legislature has provided a definition of the expression "export turnover" in Expln.2 to s.10A which the expression is defined to mean the consideration in respect of export by the undertaking of articles, things or computer software received in or brought into India by the assessee in convertible foreign exchange but so as not to include inter alia freight, telecommunication charges or insurance attributable to the delivery of the articles, things or software outside India. Therefore in computing the export turnover the legislature has made a specific exclusion of freight and insurance charges. The submission which has been urged on behalf of the revenue is that while freight and insurance charges are liable to be excluded in computing export turnover, a similar exclusion has not been provided in regard to total turnover. The submission of the revenue, however, misses the point that the expression "total turnover" has not been defined at all by Parliament for the purposes of s.10A. However, the expression "export turnover" has been defined. The definition of "export turnover" excludes freight and insurance. Since export turnover has been defined by Parliament and there is a specific exclusion of freight and insurance, the expression "export turnover" cannot have a different meaning when it forms a constituent part of the total turnover for the purposes of the application of the formula. Undoubtedly, it was open to Parliament to make a provision which has been enunciated earlier must prevail as a matter of correct statutory interpretation. Any other interpretation would lead to an absurdity. If the contention of the Revenue were to be accepted, the same expression viz. 'export turnover' would have a different connotation in the application of the same formula. The submission of the Revenue would lead to a situation where freight and insurance, though these have been specifically excluded from 'export turnover' for the purposes of the numerator would be brought in as part of the 'export turnover' when it forms an element of the total turnover as a denominator in the formula. A

construction of a statutory provision which would lead to an absurdity must be avoided."

The Special Bench of the Tribunal, in the case of ITO Vs. Sak Soft Ltd. (2009) 313 ITR (AT) 353 (Chennai) (SB) (2009-TIOL-187-ITAT-MAD-SB) also had an occasion to consider the meaning of the word 'total turnover'. After referring to the various judgments of the High Court as well as the Supreme Court held as under :

"53. For the above reasons, we hold that for the purpose of applying the formula under sub-section (4) of section 10-B, the freight, telecom charges or insurance attributable to the delivery of articles or things or computer software outside India or the expenses, if any, incurred in foreign exchange in providing the technical services outside India are to be excluded, both from the export turnover and from the total turnover, which are the numerator and the denominator respectively in the formula....."

The formula for computation of the deduction under section 10A would be as under :

Profits of the business x export turnover / Total turnover

From the aforesaid judgments, what emerges is that, there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relatable to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of section 80HHC, the export profit is to be derived from the total business income of

the assessee, whereas in section 10A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover cannot be different. Therefore, though there is no definition of the term 'total turnover' in section 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. If what is excluded in computing the export turnover is included while arriving at the total turnover, when the export turnover is a component of total turnover, such an interpretation would run counter to the legislative intent and impermissible. If that were the intention of the legislature, they would have expressly stated so. If they have not chosen to expressly define what the total turnover means, then, when the total turnover includes export turnover, the meaning assigned by the legislature to the export turnover is to

be respected and given effect to, while interpreting the total turnover which is inclusive of the export turnover. Therefore the formula for computation of the deduction under section 10A, would be as under :

$$\frac{\text{Profits of the business of the undertaking} \times \text{Export turn over}}{\text{(Export turnover + domestic turn over)}}$$

$$\text{Total Turnover}$$

11. In that view of the matter, we do not see any error committed by the Tribunal in following the judgments rendered in the context of section 80HHC in interpreting section 10A when the principle underlying both these provisions is one and the same. Therefore, we do not see any merit in these appeals. The substantial question of law framed is answered in favour of the assessee and against the revenue."

Respectfully following the aforementioned decision of the Hon'ble High Court of Karnataka in the case of Tata Elxsi Ltd. (supra), we uphold the order of the learned CIT (Appeals) in directing the Assessing Officer to reduce the expenditure incurred in foreign currency on travelling, insurance and provision of technical services abroad from both export turnover and total turnover for the purpose of computing the deduction under section 10A of the Act in the case on hand. Consequently the ground raised at S.Nos.2 by revenue is dismissed.

6. **Ground No.3 – Subscription for Broadband facility.**

6.1 In this Ground, Revenue assails the decision of the learned CIT(A) in holding that subscription for broadband services are not in the nature of fees for technical services ('FTS') and therefore there is no requirement for TDS to be made under Section 194J of

the Act. The learned Departmental Representative was heard in support of the grounds raised. The learned Departmental Representative also submitted that the judicial pronouncements relied on by the learned CIT(A) while allowing the assessee's appeal on this issue were not rendered by jurisdictional Courts and Tribunals and that the matter had not attained finality.

6.2 Per contra, the learned Authorised Representative supported the finding of the learned CIT(A), on this issue, that payment towards subscription for broadband facility is not in the nature of technical services and therefore TDS is not required to be made as per the provisions of section 194J of the Act. The learned Authorised Representative submitted that the judicial decisions followed by the learned CIT(A) support this view and therefore Revenue's appeal on this issue ought to be dismissed.

6.3.1 The facts of the matter, as emerge from the record are that the Assessing Officer observed that the assessee had paid subscription of Rs.3,37,080 towards connection for broadband services without making TDS thereon and therefore disallowed the same. On appeal, the learned CIT(A) held that payment towards subscription for broadband services was not in the nature of technical services and therefore TDS is not required to be made as per the provisions of section 194J of the Act. The operative portion of the order of the learned CIT(A) at para 3.7 thereof is extracted hereunder :-

" 3.7 I have carefully considered the issue before me. As regards the contention of the Assessing Officer that the repairs and the maintenance and expenditure on shifting of assets is capital in nature I find that the Assessing Officer has not

supported his contentions with any relevant material. Repairs have been incurred on the upkeep and maintenance of the assets. As regards expenditure on shifting of assets it is contended that this amount has been incurred to bring a CIT (Appeals) scanner to the assessee's premises at Whitefield form Narayana Hrudayalaya. There is no case made out by the Assessing Officer that expenditure has resulted in an advantage of an enduring nature I find that the expenditure under these heads is only in the nature of revenue. As regards the issue of food coupons it is seen that Assessing Officer has stated that the food coupons are of such a nature that they may be utilized for other personal purposes by the employees. However, it is evident that the food coupons are given to employees to be used at various eating joints. There is no requirement that can be imposed on the appellant to monitor the actual usage as the amount has been expended wholly and exclusively for the purpose of the business of the appellant. These amounts are clearly part of the employee cost incurred by the assessee company. Therefore, the amount of Rs.17,94,830 is to be allowed as an expenditure. As regards the non-deduction of tax on payment of Rs.3,37,080. It is seen that the payment is towards a subscription of broadband facility. I find considerable merit in the contention of the AR that the services are not in the nature of technical services and TDS need not to be made as per provisions of section 194J. The decisions relied upon by the appellant reported in CIT V Bharti Cellular Ltd. (2008) 175 taxman573 (Delhi), Skycell Communication Ltd. V CIT (2001) 119 taxman 496 (Mad), Expeditors International (India) (P) Ltd. V CIT (2008) 118 TTJ (Delhi) 652 and Pacific Internet (India) (P) Ltd. V ITO (2009) 27 SOT 524 (Mum) support this view."

6.3.2 On perusal of the grounds raised and after having heard the learned Departmental Representative, we find that Revenue, except for raising this ground challenging the order of the learned CIT(A) in following judicial pronouncements that are not of jurisdictional courts and tribunals (supra), has failed to bring on record any material evidence or place before us any judicial decision that controverts the finding of the learned CIT(A) on this issue. In this view of the matter, we concur with the view of the learned CIT(A) in following the aforesaid judicial pronouncements (supra) that endorse the view that the payment of Rs.,337,080 towards subscription of broadband facility are not

in the nature of technical services and therefore TDS need not be made thereon as per the provisions of section 194J of the Act. Consequently, Ground No.3 raised by revenue is dismissed.

7. **Ground No.4 - Repair charges : Rs.17,43,738**.

7.1 In this Ground, Revenue assails the order of the learned CIT(A) in holding that repair charges amounting to Rs.17,43,738 is allowable expenditure without taking into consideration the fact that the said expenditure was incurred towards granite work, pavement work, gate and septic tank and was correctly held to be capital expenditure by the Assessing Officer.

7.2 We have heard both the learned Departmental Representative and the learned Authorised Representative and perused and carefully considered the material on record. On an appreciation of the facts on record we concur with the observations of the learned CIT(A) that the view of the Assessing Officer, that the expenditure incurred on repairs and maintenance and shifting of assets being capital in nature, is not borne out by any material evidence to establish that the said expenditure of Rs.17,94,630 has resulted in any enduring benefit to the assessee. Before us also except for raising the ground, the Revenue had not been bring on record any material evidence to controvert this finding of the learned CIT(A) and restore the view of the Assessing Officer. In this view of the matter, we uphold the finding of the learned CIT(A) that the expenditure of Rs.17,94,830

incurred on repairs and maintenance and shifting of assets is revenue in nature. Consequently, Ground No.4 raised by revenue in this appeal is dismissed.

8. In the result, Revenue's appeal for Assessment Year 2009-10 is dismissed.

Order pronounced in the open court on 13th Feb., 2015.

Sd/-	Sd/-
(N.V.VASUDEVAN)	**(JASON P BOAZ)**
Judicial Member	Accountant Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, - A Bench.
6. Guard File.

(True copy) By Order

Asst. Registrar, ITAT, Bangalore